Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Telecommunications Act of 1996:	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended	)	CC Docket No. 96-149

REPLY OF MCI TELECOMMUNICATIONS CORPORATION IN SUPPORT OF ITS PETITION FOR RECONSIDERATION AND CLARIFICATION

MCI TELECOMMUNICATIONS CORPORATION

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Summary

For the most part, the oppositions submitted by incumbent local exchange carriers (ILECs) and other parties either do not directly address the issues raised by MCI in its petition or only serve to confirm that the petition should be granted in order to implement fully the protections for customer proprietary network information (CPNI).

First, the parties opposing MCI's petition direct most of their fire against MCI's request that the Commission reconsider the decision in the Order that the Section 272 nondiscrimination safeguards do not apply to CPNI. In its comments, MCI argued that Section 272 requires that where a Bell Operating Company (BOC) obtains its customer's approval to use her CPNI on behalf of its Section 272 affiliate or to disclose it to the affiliate, it must also provide a customer's CPNI to any third party whenever that entity can demonstrate that it also has obtained such customer's approval. Unlike the nondiscrimination rules proposed by other parties, MCI's approach would not result in the disclosure of any customer's CPNI to a third party for the purpose of marketing without the customer's approval and thus does not present any conflict with Section 222's privacy goals. Accordingly, there is nothing in the Act that would prohibit the application of Section 272 to disclosures of CPNI to third parties or that would preclude a requirement under Section 272(c)(1) that CPNI be disclosed to third parties in the manner advocated by MCI.

Thus, ILEC arguments that the application of Section 272, as

well as Section 201(b) and 202(a), to CPNI in the manner advocated by MCI would conflict with the customer control and privacy goals of Section 222 are incorrect. They all make the same mistake as the Commission -- namely, they attribute to MCI an argument that nondiscrimination may require the disclosure of CPNI without customer's approval. If, under Section 272(c)(1), a BOC is required to disclose CPNI to a third party demonstrating the same type of customer oral approval that the BOC obtains in order to share CPNI with its affiliate, customer privacy or control over her CPNI is never compromised. The customer retains complete control over disclosure or use of CPNI.

The BOCs have failed to rebut MCI's argument that BOC customer lists and other non-CPNI customer information are subject to nondiscrimination requirements. MCI requested in its petition that the Commission confirm that BOCs must make their customer lists available on a nondiscriminatory basis to requesting entities to enable the latter to solicit customer approvals for access to the CPNI held by BOCs. Thus, such lists must be made available electronically simultaneously with the BOC's disclosure of any portion of such list or similar database to contact customers to seek their approval to use CPNI.

The Commission should reaffirm that CPNI and other customer information constitutes a Unbundled Network Element (UNE) that BOCs and other ILECs must provide to all requesting carriers under Section 251 (c)(3) of the Act on a nondiscriminatory basis. Moreover, contrary to the ILECs' interpretations, such provision

of CPNI should not be limited to the initiation of service. Thus, if a BOC or other ILEC uses CPNI for marketing upon the customer's oral approval, it must provide CPNI for marketing to any requesting carrier upon the oral approval of customers.

Second, the ILECs failed to address MCI's arguments as to the need for access to CPNI, without customer approval, to initiate service. In its Petition, MCI argued, on both textual and policy grounds, that the Commission should reconsider its decision that Section 222(d)(1) applies only to carriers already processing CPNI. MCI also argued that the nondiscrimination requirements of Sections 272(c)(1), 201(b) and 202(a) should be applied to require that where a BOC or other ILEC uses CPNI, or discloses CPNI to its affiliate, without the customer's approval, in order to initiate service, it must provide CPNI to any other requesting carrier also needing it to initiate service. Such request and the CPNI should be transmitted electronically in order to ensure a real time, nondiscriminatory response to requests.

Section 222(d)(1) creates an exception to the approval requirement for the use or disclosure of CPNI "to initiate, render, bill, and collect for service." Thus, Congress has already decided that customer convenience and the need for a carrier to initiate service to a customer that has chosen that carrier overrides whatever privacy expectations that the customer may have. As MCI explained in its Petition, it is the new carrier that has won the customer that has the "existing service

relationship" with the customer and thus should not need approval to gain access to his CPNI. Therefore, Section 222(d)(1) authorizes the disclosure of CPNI to another carrier in order for the latter to initiate service, as well as the use of CPNI to enable the carrier having the CPNI to initiate service.

None of the ILECs specifically challenges the application of nondiscrimination principles to the use and disclosure of CPNI for the initiation of service, except perhaps as one aspect of their opposition to the application of nondiscrimination principles to CPNI generally. Therefore, as MCI explained in its Petition, the application of nondiscrimination principles creates a mandatory obligation to disclose CPNI, without the customer's approval, to a requesting carrier to enable it to initiate service, whether or not Section 222(c)(1) or 222(d)(1) is interpreted to allow such disclosure. Since no one specifically rebutted MCI's arguments in support of this request, it should be granted.

Third, no party directly challenged MCI's approach to "winback" and retention marketing under Section 222(b), although they view the facts differently. Various parties mischaracterize MCI's oft-stated position on "winback" and retention marketing and express opposition to it, but their rationale generally does not conflict with MCI's approach. As MCI has explained a number of times, winback or retention marketing should be prohibited only where a carrier uses the proprietary information of another carrier, especially information derived from the provision of a

monopoly service. Where MCI parts company with the ILECs is in the application of these principles to the realities of the telecommunications industry. ILECs obtain from CLECs and IXCs unique advance notice of customer decisions to switch local and long distance carriers. The use of such carrier proprietary customer-specific information for winback or retention marketing violates Section 222(b) and should be prohibited.

Finally, MCI requested a number of clarifications of the Order, which should be granted to fulfill the goals of Section 222 and the Order.

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In the Matter of	)	
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Implementation of the	)	
Telecommunications Act of 1996:	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use	)	
of Customer Proprietary Network	)	
Information and Other Customer	)	
Information	)	
	)	
Implementation of the	)	
Non-Accounting Safeguards of	)	CC Docket No. 96-149
Sections 271 and 272 of the	)	
Communications Act of 1934, as	)	
Amended	)	

REPLY OF MCI TELECOMMUNICATIONS CORPORATION IN SUPPORT OF ITS PETITION FOR RECONSIDERATION AND CLARIFICATION

MCI Telecommunications Corporation (MCI), by its undersigned counsel, hereby replies to other parties' oppositions to its Petition for Reconsideration and Clarification of the Second Report and Order in these dockets (Order).[1] For the most part, the oppositions submitted by incumbent local exchange carriers (ILECs) and other parties either do not directly address the issues raised by MCI in its petition or only serve to confirm that the petition should be granted in order to implement fully the protections for customer proprietary network information (CPNI) established in Section 222 of the Communications Act, as amended by the Telecommunications Act of 1996 (1996 Act).

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[1] Second Report and Order and Further Notice of Proposed Rulemaking, Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, FCC 98-27 (released Feb. 26, 1998).

I. THE OPPOSITIONS FAIL TO ADDRESS MCI's NONDISCRIMINATION ARGUMENTS CONCERNING THE DISCLOSURE OF CPNI FOR MARKETING

The parties opposing MCI's petition direct most of their fire against MCI's request that the Commission reconsider the decision in the Order to reverse its prior decision in the Non-Accounting Safeguards Order[2] to apply the Section 272 nondiscrimination safeguards to CPNI. In its comments, MCI had argued that Section 272 requires that where a Bell Operating Company (BOC) obtains its customer's approval to use her CPNI on behalf of its Section 272 affiliate or to disclose it to the affiliate, it must also provide a customer's CPNI to any third party whenever that entity can demonstrate that it also has obtained such customer's approval. In other words, although Section 222(c)(1) by itself allows, but does not require, a carrier to use or disclose CPNI with the customer's oral approval, the nondiscrimination requirements of Section 272(c)(1) make that otherwise permissive authorization in Section 222(c)(1) mandatory where an interexchange carrier (IXC) or other requesting entity demonstrates that it has obtained the customer's oral approval, just as the BOC obtains customer approval on behalf of its affiliate as a prerequisite to use or disclosure of CPNI.

Moreover, to enable other entities to fully exercise such

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[2] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996), recon. pending (subsequent history omitted), at ¶ 222.

nondiscrimination rights, MCI also proposed that BOCs should also be required to provide all requesting IXCs with complete customer lists so that the IXCs can seek such customer approvals and submit them to the appropriate local provider. MCI had also argued that the same nondiscrimination rules, including the provision of customer lists, should apply to ILECs through the application of the more general requirements of Sections 201(b) and 202(a) of the Act.

In its petition, MCI argued that, in reversing course and determining that Section 272 imposes no additional CPNI requirements on BOCs' sharing of CPNI with their Section 272 affiliates,[3] the Commission painted with a broader brush than was necessary and rejected MCI's approach for reasons that do not logically apply to it. Unlike the nondiscrimination rules proposed by other parties, MCI's approach would not result in the disclosure of any customer's CPNI to a third party for the purpose of marketing without the customer's approval and thus does not present any conflict with Section 222's privacy goals. MCI also raised other grounds for reconsideration of the Commission's decision on nondiscrimination, including inadequate notice and failure to consider the applicable statutory language. Various ILECs challenged one or more grounds cited in MCI's petition for reconsideration on this issue.

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[3] Order at ¶ 169.

A. There Was Inadequate Notice of the Possibility That the Commission Might Reverse its Decision in the Non-Accounting Safeguards Order That Section 272 Applies to BOCs' Use of CPNI

Some of the BOCs challenge MCI's claim of inadequate notice, arguing that, in fact, the Further Notice, by requesting comments as to the manner in which Section 272 should apply to CPNI, did provide notice that the Commission might also decide that Section 272 should not apply to CPNI at all.[4] Ameritech tries to distinguish the case cited by MCI -- McElroy Electronics Inc. v. FCC[5] -- on the grounds that it "dealt with whether a Commission order adequately informed license applicants of the Commission's own requirements," whereas, here, "[t]he issue raised by MCI is whether there was adequate notice for the Commission to change its ruling."[6] Ameritech and BellSouth also argue that a conclusion that Section 272 should not apply at all is an obvious, natural and logical outgrowth of an inquiry as to the manner in which it should apply and point to parties' arguments that it should not apply.[7]

Ameritech's reading of McElroy is correct but irrelevant. That case, like this one, dealt with the adequacy of agency notice.[8] There, the agency provided inadequate notice of its

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[4] See, e.g., SBC Comments at 10.

[5] 990 F.2d 1351 (D.C. Cir. 1993).

[6] Ameritech Comments at 10-11.

[7] BellSouth Comments at 15, n. 52; Ameritech Comments at 10-11.

[8] See McElroy, 990 F.2d at 1363-64.

requirements, while in this case, the inadequacy relates to a proposed rule. To the same effect as McElroy, but in the context of an agency's proposed rule, is McLouth Steel Products Corp. v. Thomas.[9] There, the inadequacy of the notice lay in the fact that an issue that turned out to be extremely significant appeared only in a footnote in the "Background" section of the proposed rule.

Here, the issue did not appear in the proposal at all, but is alleged to be a natural outgrowth of what did appear. As MCI explained in its Petition, however, the Further Notice focused exclusively on how Section 272 should be applied to CPNI use and disclosure; the tenor of the Further Notice was that Section 272's application to CPNI was a given -- having been decided in another proceeding -- and the only question remaining was how it should be applied. None of the ILECs has cited any statement in the Further Notice to the contrary. There was, therefore, no notice that the Commission might reverse course and decide that Section 272 does not apply to CPNI at all.

Moreover, the adequacy of notice cannot be salvaged by other parties' comments on the issue. As the D.C. Circuit has repeatedly held:

> [E]ach interested party is not required to monitor the comments filed by all others in order to get notice of the agency's proposal; hence, the comments received do not cure the inadequacy of the notice given.[10]

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[9] 838 F.2d 1317 (D.C. Cir. 1988).

[10] MCI Telecommunications Corp. v. FCC, No. 93-1464 (D.C. Cir. June 27, 1995), slip op. at 12 (citing American Fed'n of

It is also too much of a stretch to claim that the decision to reverse course and decide that Section 272 does not apply to CPNI at all was a natural and logical outgrowth of questions as to how it should apply. Nowhere did the Further Notice ask whether it should apply at all. That those issues might be related does not provide the required notice.[11]

B. There is no Support for the ILECs' Restrictive Interpretation of the "Except as Required by Law" Phrase in Section 222(c)(1)

Two of the ILECs also challenge MCI's argument that the Commission failed to consider the phrase "[e]xcept as required by law" in determining that Section 272 does not apply to CPNI. SBC and Bell Atlantic argue that the quoted phrase merely creates a standard exception for CPNI disclosures to courts, law enforcement agencies, regulators and other public officials required by subpoena, Court orders, or other legal process.[12] They point to nothing in the statute or its legislative history

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Labor v. Donovan, 757 F.2d 330, 340 (D.C. Cir. 1985); Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 505, 550 (D.C. Cir. 1983)).

[11] See, e.g., Wagner Electric Corp. v. Volpe, 466 F.2d 1013, 1019-20 (3d Cir. 1972)(NPRM proposing elimination of permissible failure rates in testing auto turn signal and hazard warning flashers did not provide adequate notice of the modified performance criteria promulgated for such devices, even though some parties perceived and commented on the relationship between those two issues); Rodway v. U.S. Dept. Of Agriculture, 514 F.2d 809, 814 (D.C. Cir. 1975) (NPRM proposing changes in administration of food stamp program failed to give notice of changes in food stamp allotment regulations).

[12] SBC Comments at 11; Bell Atlantic Opp. at 3-4.

to support that restrictive reading of the phrase, however.

SBC also argues that MCI's reasoning is circular, since the Commission already analyzed whether application of Section 272 to CPNI is "required by law" (i.e., required by Section 272(c)(1)), and determined that it is not. That misrepresents the Commission's analysis. The Commission's starting point was its comment that it could "find no express guidance from the statutory language as to how Congress intended to reconcile" Sections 222(c)(1) and 272(c)(1).[13] It never mentioned the "[e]xcept as required by law" phrase, which provides precisely the harmonization that the Commission was looking for. Believing that it was lacking clear textual guidance, the Commission fell back on a "policy" "judgment" as to how to "best further[] the policies of these two provisions" and determined that "interpreting section 272 to impose no additional obligations on the BOCs when they share CPNI with their statutory affiliates ... most reasonably reconciles the goals of these two provisions."[14]

It is clear that the Commission undertook such a policy analysis only because it assumed that there was an "apparent conflict" between the two provisions.[15] As MCI explained in its Petition, however, there is no such conflict, since Section 272 is an exception to Section 222(c)(1) "required by law." MCI's reasoning, therefore, is not circular; rather, the Commission

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[13] Order at ¶ 160.

[14] Id.

[15] Id.

simply overlooked the language in Section 222 that harmonizes the two provisions.

Bell Atlantic also argues that while the quoted phrase appears in Section 222(c)(1), Section 222(c)(2) requires disclosure of CPNI to third parties only upon the customer's written authorization.[16] That is true but irrelevant. As the Commission confirmed in the Order, a carrier may disclose CPNI to a third party upon the customer's oral approval under Section 222(c)(1).[17] Thus, Bell Atlantic's statement that "Bell Atlantic ... may not lawfully [disclose CPNI to MCI] upon oral request" is dead wrong.[18] Moreover, Bell Atlantic's implicit argument that "[t]he CPNI provisions relating to disclosure ... appear [only] in Section 222(c)(2)" is also obviously wrong.[19]

SBC makes the same mistake in its insistence that requiring disclosure to a third party somehow "eviscerate[s] the mandate of Section 222(c)(2)."[20] These BOCs jump from the fact that Section 222(c)(2) does not require disclosure to third parties upon oral approval to the conclusion that it must prohibit such disclosure to third parties irrespective of the operation of any other

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[16] Bell Atlantic Opp. at 4.

[17] Order at ¶ 84.

[18] Bell Atlantic Opp. at 4-5.

[19] Id. at 4. Bell Atlantic cites the Order at ¶¶ 114, 165 in support of its argument, but those paragraphs simply state that one way for third parties to obtain CPNI from a carrier is by means of the customer's written authorization under Section 222(c)(2).

[20] SBC Comments at 13.

provisions of law, even though the Commission has already held that Section 222(c)(1) permits such disclosure upon oral approval. Accordingly, neither Bell Atlantic nor SBC has pointed to anything in the Act that would prohibit the application of Section 272 to disclosures of CPNI to third parties or that would preclude a requirement under Section 272(c)(1) that CPNI be disclosed to third parties in the manner advocated by MCI.

C. The ILECs Have Failed to Address MCI's Point That the Commission's Rationale is Inapplicable to MCI's Approach to Nondiscrimination

Several ILECs argue that the application of Section 272, as well as Sections 201(b) and 202(a), to CPNI in the manner advocated by MCI would conflict with the customer control and privacy goals of Section 222. In doing so, they all make the same mistake as the Commission -- namely, they attribute to MCI an argument that nondiscrimination may require the disclosure of CPNI without the customer's approval. For example, SBC argues, in specifically discussing MCI's petition, that

> if BOCs must share CPNI with others when they share it with their Section 272 affiliate, customer control over their private information will be irrevocably lost, and customer convenience within the total service relationship will be sorely compromised as end users would be faced with a choice of sharing their information among everyone or no one.[21]

SBC thus characterizes MCI as "plac[ing] competitive concerns over customer privacy."[22] Similarly, Ameritech argues that

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[21] SBC Comments at 12.

[22] Id.

applying Section 272's nondiscrimination requirement to the BOC transfer of CPNI to its affiliate could defeat customers' privacy interests or prevent such BOC sharing of CPNI even with customer consent. Ameritech also emphasizes the difficulties involved in an approval solicitation requirement.[23]

The problem with those arguments is that none of them applies to MCI's petition. If, under Section 272(c)(1), a BOC is required to disclose CPNI to a third party demonstrating the same type of customer oral approval that the BOC obtains in order to share CPNI with its affiliate, customer privacy or control over her CPNI is never compromised. The customer retains complete control over disclosure or use of CPNI. Moreover, the BOC is not restrained in any way from sharing CPNI with its affiliate under this approach, once it has oral approval to do so or the affiliate is providing service to the customer. A given customer's CPNI that is shared with the affiliate need not be disclosed to a third party unless and until the third party also notifies the BOC that it has obtained the customer's oral approval. Moreover, under MCI's approach, the BOC would have no approval solicitation requirement. Thus, contrary to the Order[24] and the ILECs' arguments, MCI's approach is perfectly consistent with customer privacy and control over CPNI, the goal of customer convenience and the total service approach.

US West appears to argue that it really is not very

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[23] Ameritech Comments at 9.

[24] Order at ¶ 158, 161-62.

difficult for unaffiliated entities to secure access to BOC local service CPNI, since some ILECs provide such access without written customer authorization, in some cases electronically though ILEC OSSs.[25] It is difficult to know what to make of this statement. US West does not deny that other ILECs refuse to provide CPNI short of written authorization.

Pacific Bell, for example, refuses to provide electronic access to customer service records (CSRs) unless the requesting carrier has written authorization. It will only provide facsimile copies of CSRs, rather than electronic access, where the requesting carrier has the customer's oral approval.[26] An even more abusive practice is BellSouth's technique of contacting customers to solicit "freezes" on their CSRs in order to make them unavailable to CLECs, under any mode of access. BellSouth itself, of course, is conveniently not similarly restricted. In order to "unfreeze" a CSR, BellSouth requires the CLEC to submit a copy of a written authorization. BellSouth then calls the customer to verify the written authorization, after which BellSouth will then send a hard copy of the CSR by facsimile, a deliberately anticompetitive process that takes from 7 to 30 days to complete.

The application of nondiscrimination rules should not turn on whether such rules are needed as to all ILECs all of the time.

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[25] US West Opp. at 7-9.

[26] The Southern New England Telephone Company also requires written authorization before providing access to CSRs.

MCI and other competitive carriers cannot make marketing plans based on the passing mood of each ILEC. The abuses discussed above demonstrate the critical need for strict nondiscrimination rules governing BOC and other ILEC CPNI and other customer information. If anything, the fact that some ILECs may provide CPNI upon oral approval in certain circumstances demonstrates the reasonableness of MCI's request. Moreover, it is significant that US West apparently does not quarrel with competitive carriers' electronic access to CPNI, but, rather, the conditions that may be imposed on such access. In order to prevent the continuation of abuses such as Pacific Bell's and BellSouth's practices, the Commission should make it clear on reconsideration that nondiscriminatory access to CPNI in the marketing context means immediate electronic access in response to a request by a carrier that states that it has the customer's oral approval.[27]

D. The Application of Section 272 to the BOCs' Use of CPNI is Not Precluded on Account of the Issues Raised by the ILECs That Were Not Addressed in the Order

Some of the ILECs argue that application of Section 272 in the manner advocated by MCI is also precluded by other arguments previously raised but which were not addressed in the Order. For example, SBC and Ameritech argue that where CPNI is used for

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[27] Moreover, whatever method is chosen for verification of customer approvals should not be allowed to hold up the electronic transmission of the CPNI. If it turns out that CPNI was provided to a carrier for marketing that did not have oral approval in a given instance, indemnification provisions in intercarrier agreements should take care of any liability arising out of wrongful CPNI disclosure.

joint marketing covered by Section 272(g), such CPNI use is exempted from the nondiscrimination requirements of Section 272(c) by Section 272(g)(3).[28] As MCI and other parties have previously explained, however, Section 272(g)(3) was obviously meant to exempt BOCs from having to offer joint marketing services on a nondiscriminatory basis to other IXCs; it was not intended to exempt from the requirements of Section 272(c)every other facet of BOC monopoly operations that might play a role in joint marketing. Otherwise, the exemption would swallow up the entire range of BOC operations.

For example, the services that are being jointly marketed by the BOC and its affiliate are not themselves freed from the restrictions of Section 272(c)(1) by Section 272(g)(3). Similarly, there is no reason to free CPNI and its separate requirements in Section 222 from the nondiscrimination provisions of Section 272(c)(1) whenever it might be used in conjunction with joint marketing. Having to disclose CPNI to unaffiliated entities on the same basis as to a separate affiliate hardly constitutes being forced to provide marketing services to unaffiliated entities, and it is only the latter that Section 272(g)(3) should prevent.

The ILECs' Section 272(g) argument is also precluded by the language of that exemption, which only extends to the "joint marketing and sale of services permitted under this subsection [272(g)]." (Emphasis added). Not only does the use or disclosure

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[28] SBC Comments at 14; Ameritech Comments at 10.

of CPNI fall outside this provision because such activities do not constitute joint marketing, but they also are not activities "permitted under" Section 272(g). Since CPNI practices, unlike BOC joint marketing, are not activities that are permitted only by virtue of Section 272(g), they are not covered by the exemption in Section 272(g)(3). Accordingly, Section 272(g)(3) cannot save the BOCs or other ILECs from the application of the nondiscrimination requirements of Section 272(c)(1) to the use or disclosure of CPNI.[29]

US West also alludes to constitutional objections to the application of nondiscrimination requirements to CPNI,[30] but does not explain why such objections are any stronger than the constitutional objections to the total service approach that were rejected in the Order.[31] US West cites a footnote in the Order stating that the Commission's decision on nondiscrimination

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[29] Moreover, as discussed infra, Sections 201(b) and 202(a), which are not affected by the limited exemption in Section 272(g)(3), are also applicable to the BOCs' and other ILECs' use or disclosure of CPNI for joint marketing purposes and prohibit, in circumstances where disclosure is not precluded by Section 222, any withholding of CPNI from other entities that inhibits consumer choice or for anticompetitive purposes. The only conceivable purpose for such withholding, while the BOC or other ILEC uses the same CPNI under the same circumstances in its joint marketing, would be to unreasonably restrain competition. Furthermore, Section 601(c)(1) states that the provisions of the 1996 Act "shall not be construed to modify, impair, or supersede Federal ... law unless expressly so provided...." Thus, nothing in the 1996 Act, including Section 272(g)(3), modifies or supersedes Sections 201(b) and 202(a) of the Communications Act, which prohibit anticompetitive manipulation of CPNI.

[30] US West Opp. at 6, n. 17.

[31] Order at ¶ 43.

obviates the need to resolve ILECs' claims that treating BOC affiliates as unaffiliated entities would infringe their First Amendment rights to communicate with their affiliates and customers.[32] As the Commission found in rejecting similar objections to its total service approach, regulation of CPNI use does not infringe carriers' ability to communicate, and, in any event, restrictions on commercial speech will be upheld where the government asserts a substantial interest in support of the regulation, the regulation advances that interest, and the regulation is narrowly drawn.[33] Those conditions would certainly be met here, given the interest in nondiscrimination reflected in Section 272(c) and the limited nature of MCI's approach, which would not condition a BOC's ability to share CPNI with its affiliate on a requirement that such CPNI be shared with third parties, but, rather, would require that such third parties secure oral approval from the customer.

E. The BOCs Have Failed to Rebut MCI's Argument That BOC Customer Lists and Other Non-CPNI Customer Information Are Subject to Nondiscrimination Requirements

Following up on the Commission's reaffirmation in the Order that the nondiscrimination requirements of Section 272(c)(1) at least apply to "the BOCs' sharing of all other information (i.e.,

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[32] See Order at ¶ 160, n. 564 (cited in US West Opp. at 6, n. 17).

[33] Order at ¶ 43.

non-CPNI) ... with their section 272 affiliates,"[34] and the Bureau's finding in the Clarification Order that customer names, addresses and telephone numbers do not constitute CPNI, MCI requested in its petition that the Commission confirm that BOCs must make their customer lists available on a nondiscriminatory basis to requesting entities to enable the latter to solicit customer approvals for access to the CPNI held by BOCs. Thus, such lists must be made available electronically simultaneously with the the BOC's disclosure of any portion of such a list or similar database to its affiliate or the BOC's or its affiliate's decision to use any portion of such a list or similar database to contact customers to seek their approval to use CPNI, whichever occurs earlier.

US West and SBC oppose MCI's request, except insofar as customer list information is made available in the form of subscriber list information (SLI).[35] US West argues that the application of nondiscrimination requirements to non-SLI customer list information would raise constitutional issues because it would place conditions on BOCs' use of their own proprietary information. US West also argues that to the extent that such information is not SLI, it is billing, name and address

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[34] Order at ¶ 164, n. 573.

[35] Contrary to US West's suggestion, at 14, SLI would not be an adequate source of the customer list information needed to solicit customer approvals, since it does not include such data as nonpublished numbers and only applies to customer list information that has been published in a directory or accepted for such publication.

information (BNA), the use of which by non-affiliated carriers is restricted.[36]

US West's constitutional objection is just as weak as its constitutional objection to the Commission's total service approach, discussed above. It may communicate whatever it wishes to anyone; its freedom to communicate is not infringed by being required to provide customer list information to others. Moreover, a requirement of nondiscriminatory access to BOC customer list information would advance the government's substantial interest in competition and is narrowly drawn.[37] Moreover, since US West concedes, as it must, that customer list information is not CPNI, its objection to the application of the Section 272(c)(1) nondiscrimination requirements to such information is essentially a challenge to the constitutionality of Section 272(c)(1) to any "information," an assault that it does not even attempt to justify.

To the extent that such customer list information is BNA, the restrictions applied to non-BOC affiliates' use of BNA should not pose a significant obstacle to MCI's position. The BNA rules prohibit the use of BNA for marketing,[38] but the solicitation of

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[36] US West Opp. at 13-14.

[37] See Turner Broadcasting System, Inc. v. FCC, 115 S.Ct. 2445, 2470 (1994)("the Governments's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment").

[38] Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards,